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No. 88-1635

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

TOMMIE JEAN TRUESDALE,
PETITIONER

V.

UNIVERSITY OF NORTH CAROLINA, et al.,
RESPONDENTS,

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

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15 pp

QUESTION PRESENTED

DID CONGRESS INTEND TO ABROGATE THE STATES' COMMON LAW DEFENSE OF SOVEREIGN IMMUNITY WHEN IT ENACTED 42 U.S.C. § 1983?

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STATEMENT OF THE CASE

Respondents the University of North Carolina ("UNC") and Winston-Salem State University ("WSSU") are agencies of the State of North Carolina. Appendix to Petition (hereinafter A.P.), pp. 17a-18a. During the time relevant to this action, Respondent Robert Fenning was WSSU Vice Chancellor for Business Affairs and Respondent James Lewis was WSSU Director of Campus Police. A.P., p. 9a. In August of 1987 Petitioner, a former employee of WSSU, filed a complaint in North Carolina state court in which she

alleged that UNC, WSSU and Mr. Fenning and Mr. Lewis, in both their official and individual capacities, had violated her rights under the United States Constitution and 42 U.S.C. § 1983, when they terminated her employment. A.P., pp. 9a-10a. Petitioner sought damages and injunctive relief from UNC, WSSU, and Mr. Fenning and Mr. Lewis, in both their official and individual capacities. A.P., p. 8a. In their answer Respondents alleged that Petitioner's claims for damages against UNC, WSSU, and Mr. Fenning and Mr. Lewis, in their official capacities, were barred by the doctrine of sovereign immunity. A.P., pp. 9a-10a.

After the parties had conducted discovery, Respondents filed a motion for summary judgment in which, among other defenses, they asserted that they were entitled to sovereign immunity. A.P., pp. 10a and 15a. Petitioner filed a cross motion for summary judgment. The trial court denied Respondents' motion and granted Petitioner's motion on grounds that Respondents had violated Petitioner's rights under the Fifth, Ninth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. A.P., pp. 1a-4a.

On appeal the North Carolina Court of Appeals reversed the trial court's decision and held that Petitioner's action for damages against UNC, WSSU, and Mr. Fenning and Mr. Lewis, in their official capacities, was barred by the doctrine of sovereign immunity. A.P., pp. 15a-21a. The Supreme Court of North Carolina subsequently denied the parties' petitions for discretionary review and dismissed their appeals for lack of a substantial constitutional question. *Truesdale v. University of North Carolina*, 91 N.C. App. 186, 371 S.E.2d 503, *disc. review denied and appeal dismissed*, 323 N.C. 706, 377 S.E.2d 229 (1988); A.P., pp. 36a-37a. The issue presented in this Petition is whether Respondents may rely on the defense of sovereign immunity to defeat Petitioner's § 1983 claim for damages brought in state court.

REASONS FOR DENYING THE WRIT

THE NORTH CAROLINA COURT OF APPEALS' DECISION TO RECOGNIZE SOVEREIGN IMMUNITY AS A DEFENSE IN STATE COURT ACTIONS BROUGHT UNDER 42 U.S.C. § 1983 FOR DAMAGES AGAINST THE STATE IS CONSISTENT WITH THIS COURT'S DECISIONS RECOGNIZING THE ELEVENTH AMENDMENT TO BE A DEFENSE TO § 1983 ACTIONS BROUGHT IN FEDERAL COURT AND DOES NOT CONFLICT WITH ANY DECISION OF ANY OTHER STATE COURT OF LAST RESORT.

Under North Carolina law the doctrine of sovereign immunity protects the State from being sued, in its own name or the name of its agencies or its officials, without its consent. *McDonald v. University of North Carolina*, 299 N.C. 457, 263 S.E.2d 578 (1980); *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976); *General Electric Co. v. Turner*, 275 N.C. 493, 168 S.E.2d 385 (1969). The State's sovereign immunity cannot be waived or surrendered by inference or implication but only by plain, unmistakable mandate of the lawmaking body. *Orange County v. Heath*, 282 N.C. 292, 192 S.E.2d 308 (1972). North Carolina has waived its sovereign immunity in actions for damages arising out of breaches of State contracts and, to a limited extent, in actions for damages arising out of negligent torts committed by State agents. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976); N.C. Gen. Stat. § 143-291 *et seq.* Furthermore, sovereign immunity, as applied in North Carolina, does not protect State officers from suits for prospective injunctive relief. *Pue v. Hood,* 222 N.C. 310, 22 S.E.2d 896 (1942); *Schloss v. Highway Commission*, 230 N.C. 489, 53 S.E.2d 577 (1949). However, neither the North Carolina General Assembly nor the Supreme Court of North Carolina has abrogated the State's sovereign immunity in actions for damages brought under 42 U.S.C. § 1983 for violation of civil rights secured under the constitution or statutes of the United States. *Truesdale v. University of North Carolina,* 91 N.C. App. 186, 371 S.E.2d 503, *disc. review denied and appeal dismissed*, 323 N.C. 706, 377 S.E.2d 229 (1988).

Whether a state court action for damages brought under § 1983 is subject to limitations or immunities generally applicable to other state actions is a question of federal law. *Felder v. Casey*, 487 U.S. ___, 108 S. Ct. 2302 (1988); *Owen v. City of Independence*, 445 U.S. 622 (1979); *Martinez v. California*, 444 U.S. 277 (1980). Whether federal law recognizes such limitations and immunities is, in turn, essentially a question of statutory construction. *Owen v. City of Independence*, 445 U.S. at 635; *Wood v. Strickland*, 420 U.S. 308 at 314 (1975); *Tenney v. Brandhove*, 341 U.S. 367 at 376 (1951).

For nearly forty years the Court has regularly considered claims that state law immunities protect defendants from liability for damages under § 1983. *Tenney v. Brandhove*, 341 U.S. 367 (1951) (legislators entitled to absolute immunity); *Pierson v. Ray*, 386 U.S. 547 (1967) (judges entitled to absolute immunity); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (Governor entitled to qualified immunity); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (superintendent of state hospital entitled to qualified immunity); *Wood v. Strickland*, 420 U.S. 308 (1975) (school board members entitled to qualified immunity); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutors entitled to absolute immunity); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978) (municipality not entitled to immunity); *Procunier v. Navarette*, 434 U.S. 555 (1978) (prison officials and officers entitled to qualified immunity). In *Owen v. City of Independence*, 445 U.S. 638, the Court described the standard it applied to reach its decisions in those cases as follows:

> Where the immunity was well established at common law at the time § 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity.

When examined in light of this standard, it is evident that the defense of sovereign immunity was well established at common law and is not incompatible with the purposes of the Civil Rights Act. Therefore, the Court should deny the Petition to review the lower court opinion in this case.

First, there is no question but that the States' right to state sovereign immunity was well established at common law at the time § 1983 was enacted. In *Hans v. Louisiana*, 134 U.S. 1 (1890) the Court had occasion to review the doctrine of sovereign immunity in the context of the State of Louisiana's claim that the Eleventh Amendment barred actions brought against it in federal court by one of its own citizens. In holding that the Eleventh Amendment did indeed bar such actions the Court described the history of the doctrine of sovereign immunity as follows:

> The suability of a State without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. It was fully shown by an exhaustive examination of the old law by Mr. Justice Iredell in his opinion in *Chisholm v. Georgia* [2 Dall 419 (1793)]; and it has been conceded in every case since, where the question has, in any way, been presented, even in the cases which have gone farthest in sustaining suits against the officers or agents of States. (*Citations omitted.*) In all these cases the effort was to show, and the court held, that the suits were not against the State or the United States, but against the individuals; conceding that if they had been against either the State or the United States, they could not be maintained.

Id. at 16.

More recently, the Court has observed that, "[T]he fundamental principle enunciated in *Hans* has been among the most stable in our constitutional jurisprudence. . . . The general principle of state sovereign immunity has been adhered to without exception by this Court for almost a century." *Welch v. Dept. of Highways and Public Transportation*, 483 U.S. ___, at ___, 107 S. Ct. 2941 at 2952 and 2956 (1987). Sovereign immunity's common law lineage is, therefore, beyond question.

Second, even a cursory review of the Court's decisions regarding the application of Eleventh Amendment immunities to § 1983 suits in federal court reveals that recognition of the defense of sovereign immunity in a § 1983 action against a state in state court would not undermine the purposes of the Civil Rights Act of 1871.

The primary purpose of the Civil Rights Act of 1871 was to ensure that individuals could recover damages and secure injunctive relief to remedy injuries resulting from the violation of their constitutional or statutory rights. *Burnett v. Gratten*, 468 U.S. 42, at 55 (1983); *accord*, *Felder v. Casey*, 108 S. Ct. at 2302. Notwithstanding § 1983's broad remedial objectives, the Court has repeatedly and unequivocally held that the Eleventh Amendment bars § 1983 actions for damages brought against states in federal courts. *Edelman v. Jordan*, 415 U.S. 651 (1974); *Alabama v. Pugh*, 438 U.S. 781 (1978); *Quern v. Jordan*, 440 U.S. 322 (1979); *see also*, *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690 n.54 (1978) (holding that municipal governments subject to suit for damages under § 1983 expressly limited to government units which are not part of State for Eleventh Amendment purposes.)

For all intents and purposes the place of the Eleventh Amendment in federal jurisprudence is identical to that which the doctrine of sovereign immunity holds in state courts. *See Ex Parte New York*, No. 1, 256 U.S. 490 at 497 (1921) (a state is immune from suit by its own citizens in federal court "because of the fundamental rule of which the [Eleventh] Amendment is but an exemplification."); *Quern v. Jordan*, 440 U.S. 332 at 341 (1979) (the Eleventh Amendment serves to protect the "traditional sovereign immunity of the States."); *Welch v. Dept. of Highways and Public Transportation*, 107 S. Ct. at 2952 ("the Eleventh Amendment embodies a broad constitutional principle of sovereign immunity."). The Court's consistent recognition of the States' Eleventh Amendment immunity from § 1983 suits demonstrates that the doctrine of sovereign immunity is not incompatible with purposes of the Civil Rights Act of 1871. In fact, the Court's holding that Congress did not intend to include States within the definition of a "person" as that term is used in § 1983, precludes a finding that the Respondents' reliance on the defense of sovereign

immunity is incompatible with any of the purposes of § 1983. *Will v. Michigan Department of State Police*, 1989 W.L. 62457 (U.S. June 15, 1989).

One measure of incompatibility between an asserted state law immunity and the purposes of § 1983 is the degree to which recognition of the immunity deprives § 1983 plaintiffs of significant relief. However, as the Court noted in *Welch v. Dept. of Highways and Public Transportation*, 107 S. Ct. at 2953, recognition of the States' right to sovereign immunity does not leave persons harmed by state action without remedies for their injuries. In this case, for example, Petitioner has also alleged § 1983 actions against both Mr. Fenning and Mr. Lewis in their individual capacities. If she prevails on either of those actions, she will be entitled to complete monetary relief from those individual defendants. Furthermore, the lower court held that the petitioner may pursue her claims for prospective injunctive, *e.g.*, reinstatement, against the State officers who she alleges wrongfully discharged her from her state employment. *Truesdale v. University of North Carolina*, 91 N.C. App. 186. Therefore, the lower court's holding that sovereign immunity barred Petitioner's § 1983 claim for damages against the State and its agents acting in their official capacities did not leave her without an effective remedy for the injuries alleged in this case.

Contrary to Petitioner's representations, the decision to recognize sovereign immunity as a defense to § 1983 actions for damages brought in state court is entirely consistent with the Court's recent holding in *Felder v. Casey*, 108 S. Ct. 2302 (1988). In *Felder* the Court held that federal law preempts state laws that: (1) present obstacles to § 1983 claims brought in state court which would not exist if the action were brought in federal court and (2) frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the action is brought in state or federal court. *Id.* at 2308.

When judged by these practical standards, the doctrine of sovereign immunity is indistinguishable from the protection afforded States under the Eleventh Amendment. Sovereign immunity, as applied by the lower court in this case, creates no greater obstacle to

state court plaintiffs' § 1983 claims than the Eleventh Amendment presents to federal court plaintiffs. In fact, a decision holding that Respondents could not rely on sovereign immunity to defeat a § 1983 claim for damages in North Carolina courts would frequently and predictably produce different outcomes in § 1983 litigation based solely on the fact that the action was brought in state court rather than federal district court. Therefore, consistent with the decision in *Felder,* Respondent is entitled to rely on its sovereign immunity to defeat Petitioner's claims in state court to the same extent that it would be entitled to assert the protection of the Eleventh Amendment if the action had been brought in federal court.

In an effort to demonstrate that state courts are confused and mistaken about the application of principles of sovereign immunity in the context of § 1983 actions, Petitioner has cited cases in which state courts in Florida, Georgia, Iowa, Maine, Minnesota, New Mexico, North Dakota and Texas have held that the doctrine of sovereign immunity bars plaintiffs from bringing § 1983 actions in state court against a state in its own name. Courts in Connecticut, *Fetterman v. University of Connecticut*, 192 Conn. 539, 473 A.2d 1176 (1984), and Hawaii, *Makanui v. Department of Education*, 721 P.2d 165 (Hawaii Ct. App. 1986) have reached similar conclusions. Petitioner has not cited any conflicting decisions from state courts of last resort. Rather than demonstrating confusion and misunderstanding, the holdings in these cases, which are entirely consistent with this Court's decisions noted above, show that state courts fully understand that Congress did not intend § 1983 to abrogate the defense of sovereign immunity.

CONCLUSION

Petitioner has not cited any decision of a state court of last resort which conflicts with the holding in this case. Furthermore, this Court's decisions regarding the Eleventh Amendment, which shares a common origin and purpose with the doctrine of sovereign immunity as applied by the lower court, provide ample precedent and guidance for state courts faced with the issue of whether states may rely on sovereign immunity to defeat a § 1983 action for damages

brought in state court. Consequently, the Petition does not present an important question of federal law which has not been and should be decided. Therefore, Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted this the 27 day of June 1989.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS upon the attorney of record by placing same in the United States mail, first class postage prepaid, addressed as follows:

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This the 27 day of June, 1989.

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